NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH,
H. ARNOLD MULLER,
HELEN B. O'BANNON,
MICHAEL J. BROWNE,
WILLIAM J. DAVIS,
LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. PETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M. D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D. O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees

On Appeal From The United States Court of Appeals For The Third Circuit

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BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Court has appellate jurisdiction to review a non-final decision of a court of appeals declaring provisions of state law unconstitutional in light of the fact that the appeal statute does not expressly apply only to final orders and the purposes which underlie the statute support a rule permitting review of non-final orders.

2. Whether a court of appeals properly may declare provisions of state law unconstitutional on appeal from a district court's disposition of a motion for preliminary injunction when it is clear that the defendants were not provided a sufficient opportunity to present their defenses.

3. Whether the Court of Appeals misapplied the precedents of this Court in declaring unconstitutional numerous provisions of Pennsylvania's Abortion Control Act.

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Court of Appeals, including the statements dissenting from the denial of rehearing in banc (J. S. App.[1] 3a-173a), is reported at 737 F.2d 283. The opinion of the District Court (J.S. App. 174a-272a) is reported at 552 F.Supp. 791.

JURISDICTION

The judgment of the Court of Appeals (J.S. App. 153a-154a) holding unconstitutional 18 Pa. Cons. Stat. Ann. §§3205, 3206, 3208, 3210(b) and (c), 321 and 3214(a),(b) and (h) (Purdon 1983) was entered on May 31, 1984. A timely petition for rehearing in banc was denied by order entered on June 28, 1984. J.S. App. 155a-156a. A notice of appeal to this Court (J.S. App. 1a-2a)

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[1] "J.S. App." refers to the appendix to the jurisdictional statement.

was filed on September 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2). In granting review, the Court postponed consideration of the question of jurisdiction to the hearing on the merits. If appellate jurisdiction is lacking, the Court has certiorari jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions are reproduced as an addendum to this brief.

STATEMENT

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit in which the court, in the course of reviewing a district court decision denying almost entirely a preliminary injunction,[2] held unconstitutional numerous provisions of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983) (hereinafter "the Act" or "the Pennsylvania Act"). Among the provisions stricken by the Court of Appeals were those dealing with informed consent (Section 3205), parental consent or judicial approval for minors (Section

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[2]The District Court preliminarily enjoined only the requirement that 24 hours expire between the time a woman receives certain specified information and performance of the abortion, 18 Pa. Cons. Stat. Ann. §3205(a) (Purdon 1983). (J.S. App. 270a).

3206), printed information (Section 3208), abortions after viability (Section 3210(b) and (c)), and reporting requirements for abortion providers (Sections 3211(c) and 3214(a) and (h)).[3]

Proceedings were commenced in the United States District Court for the Eastern District of Pennsylvania on October 2, 1982, when the appellees[4] filed an action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 in which they alleged that the Act

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[3]The Court of Appeals also struck down Section 3215(e), relating to coverage for abortion in insurance policies. That provision is not before the Court.

[4]The plaintiffs below (appellees in this Court) were the American College of Obstetricians and Gynecologists, Pennsylvania Section, individual physicians who perform abortions, abortion clinics, clergymen and one woman who desires to purchase comprehensive health insurance.

in its entirety violated various constitutional provisions.[5] With the Act scheduled to go into effect on December 8, 1982, appellees filed a motion for preliminary injunction on October 29, 1982. On November 18, 1982, the District Court ordered the parties, solely for purposes of a preliminary injunction hearing to be held on December 2, to submit by November 30 a stipulation of uncontested facts; a comprehensive statement of contested facts, with the proviso that "no party may contest a

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[5]Named as defendants below (appellants here) were Governor Thornburgh, Health Secretary Muller, Public Welfare Secretary O'Bannon, Insurance Commissioner Browne, Commonwealth Secretary Davis, Attorney General Zimmerman and Montgomery County District Attorney Smyth. Defendants Thornburgh and O'Bannon filed a motion to dismiss themselves as defendants. Appellees stipulated to the dismissal of Thornburgh, but the District Court has not issued an order on the dismissal requests.

fact unless it is prepared to present evidence regarding that fact at the preliminary injunction hearing"; and, a list of witnesses, together with a brief statement of the testimony to be presented by each witness. J.S. App. 274a-278a.

In view of the brief time available to prepare for the hearing and to meet the requirements of the judge's order outlined above, the parties agreed to a stipulation of facts solely for purposes of the motion for preliminary injunction. See App. 9a;[6] J.S. App. 176a, n.1. At the hearing on December 2 no testimony was presented. J.S. App. 177a.

Following the District Court's December 7 order denying almost entirely

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[6]"App." refers to the joint appendix filed together with this brief.

the preliminary injunction, on December 9 the Court of Appeals, on motion of appellees, enjoined enforcement of the entire Act pending appeal. After argument and reargument of the appeals, on May 31, 1984,[7] the Court of Appeals, in a split decision, held that numerous provisions of the Act were unconstitutional. J.S. App. 3a-152a. A petition for rehearing in banc was denied on June 28, 1984, with four judges dissenting. J.S. App. 155a-173a.

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[7]After expedited briefing and argument, the Court of Appeals ordered that the appeals be held pending decisions by this Court in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); and, Simopoulos v. Virginia, 462 U.S. 506 (1983), which were then pending before the Court. Following decisions in those cases on June 15, 1983, the Court of Appeals ordered that supplemental briefs be filed and reargument was held on November 21, 1983.

In her majority opinion for the court, Judge Sloviter held first that, although the appeal was from a preliminary injunction order, "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." J.S. App. 21a. The majority then proceeded to hold unconstitutional ten provisions of the Act. Chief Judge Seitz dissented in part, disagreeing with the majority's holdings of unconstitutionality as to Sections 3205(a)(2); 3208; 3210(c); 3211; and, 3214(a),(b) and (h). J.S. App. 132a-152a.

SUMMARY OF ARGUMENT

I. The Court has jurisdiction over an appeal, brought pursuant to 28 U.S.C. §1254(2), to review a decision of a court of appeals which, although not finally disposing of all the issues in the case, declares unconstitutional provisions of state law. Slaker v. O'Connor, 278 U.S. 188 (1929), which holds to the contrary should be overruled.

Slaker failed to take into account factors which demonstrate decisively that finality is not required. The statute itself does not expressly require finality. This omission by Congress must be regarded as purposeful since a number of jurisdictional statutes enacted at the same time as the predecessor to Section 1254(2) (43 Stat. 939, §240(b)) specifically required finality. See 43 Stat. 936, §128(9); 937, §237(a); 938, §238(3).

Section 1254(2) reflects a Congressional concern for maintenance of the delicate balance of federal-state relations. Congress recognized that federal court injunctions against enforcement of state laws raise serious questions which call for mandatory, expeditious review by this Court. It is faithful to this intention to construe §1254(2) to permit an appeal in this case.

This litigation was in its infancy when it reached the Court of Appeals on appeal from a preliminary injunction order. Much remains to be done in the District Court before a final judgment can be entered. Yet, if the Court of Appeals' decision cannot be reviewed by appeal at this time, this injunction, which we believe to be clearly erroneous, will remain in effect for an extended period. This result cannot be consistent with the intent of Congress which was to

facilitate in every way this Court's mandatory review of injunctions against enforcement of state laws.

II. The Court of Appeals exceeded the proper scope of its review when it declared unconstitutional numerous provisions of state law. The appeal before the Court of Appeals was from an order denying in most part a preliminary injunction. But without the suggestion of any party, the court reached the merits.

This Court has held squarely that this type of action is improper. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940). Preliminary injunction proceedings often are conducted hastily and may not afford the parties, especially defendants, a sufficient opportunity to present their cases. University of Texas v. Camenisch, 451 U.S. 390, 394-395 (1981); Meccano, Ltd.

v. John Wanamaker, New York, 253 U.S. 136, 142 (1920).

In the present case, the motion for preliminary injunction was filed more than four months after the statute was passed, but only a short time before it was to go into effect. Filed with the motion was a two volume compendium of affidavits, which later became the basis for a court-ordered stipulation. Appellants were not permitted to contest facts offered by appellees unless they were prepared to offer evidence at the preliminary injunction hearing. Thus, appellants had no fair opportunity to present their defenses.

III. Even the one-sided record presented to the District Court demonstrates, however, that the provisions struck down by the Court of Appeals are, to the contrary, in accord with this Court's recent decisions in City of

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (hereinafter "City of Akron") and Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) (hereinafter "Ashcroft").

A. In Ashcroft, the Court upheld a requirement for attendance of a second physician at abortions performed after viability, 462 U.S., at 485-486 (opinion of Powell, J.), 505 (O'Connor, J., concurring in part in the judgment and dissenting in part). To the extent that there must be an exception to the second-physician requirement for emergencies, Pennsylvania's statute explicitly permits an exception where "necessary to preserve maternal life or health. 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983), Addendum, at 27a.

B. Pennsylvania requires physicians to submit reports containing

information on abortions and abortion complications. 18 Pa. Cons. Stat. Ann. §3214(a), (b), (h) (Purdon 1983), Addendum, at 31a-33a, 40a-42a. In accordance with the decisions in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81 (1976) (hereinafter "Danforth") and Ashcroft, 462 U.S., at 487-488, the reports are not unduly burdensome and are confined to health-related data. Although some extra efforts will be required of clinic personnel to complete these reports, it will be minimal. Certainly, the reporting requirements impose no significant burden on a woman's right to decide whether to have an abortion.

C. Pennsylvania's informed consent statute for abortions, 18 Pa. Cons. Stat. Ann. §3205(a) (Purdon 1983), Addendum, at 9-13a, comports with this Court's holdings that a state may require

that information be given on the procedure and its consequences. See Danforth, 428 U.S., at 67. The giving of information on medically accurate risks, the age of the fetus, assistance available for childbirth, and the unforeseeability of physical and psychological effects has been approved by this Court on other occasions. City of Akron, 462 U.S., at 442-447 and n.37; Planned Parenthood Assoc. v. Fitzpatrick, 401 F.Supp. 554, 586-588 (E.D. Pa. 1975) (three-judge court), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976). Provisions requiring that the woman be informed of the identity of her physician and of the availability of optional printed materials are unobjectionable since they do not invade the physician's medical judgment.

The informational requirements clearly are severable from the require-

ment that several of the items of information be provided the woman by a physician. The Legislature's intention to permit severability is clear - there is a broad severability clause in the statute, Addendum, at 45a; the Legislature did not demonstrate a single-minded obsession with physician-only counseling, as is demonstrated by the omission of physician counseling from Section 3205(a)(2), Addendum, at 11a; the Legislature has demonstrated its desire, by passing this altered statute after a veto of a prior, similar measure, to have in effect a statute which meets constitutional standards.

D. The provisions for parental consent or judicial approval for minors' abortions provide the alternatives required by the Court in Ashcroft, 462 U.S., at 491 n.16 (Opinion of Powell, J.), 505 (O'Connor, J., concurring in

part in the judgment and dissenting in part). The statute, moreover, provides the framework for expeditious, confidential judicial approval proceedings. 18 Pa. Cons. Stat. Ann. §3206(f),(h) (Purdon 1983), Addendum at, 18a-19a, 20a.

Moreover, subsequent to the Court of Appeals' decision, the State Supreme Court issued detailed rules which provide unequivocally for confidential, expeditious consideration of a minor's request for judicial approval. Addendum, at 48a-54a. The Court may review the law as it stands now and uphold the statute. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981).

E. It is permissible for a State to require that the abortion technique used in an abortion performed after viability of the fetus be the one most likely to preserve the fetus' life,

unless the technique poses an increased risk to the woman. See Colautti v. Franklin, 439 U.S. 379, 400 (1979). Pennsylvania's statute on post-viability abortions, 18 Pa. Cons. Stat. Ann. §3210 (b) (Purdon 1983), Addendum, at 27a-28a, meets this standard.

The Court of Appeals clearly erred in failing to construe the statute in a manner which preserves its constitutionality. See United States v. Harriss, 347 U.S. 612, 618 (1954). The court read the statute, which permits use of an abortion technique more dangerous to the fetus only if the technique would pose a "significantly greater risk" to the woman, as requiring a trade-off of the woman's health in favor of the fetus. The District Court properly interpreted the statutory term as requiring only that a difference in risk be meaningful to permit use of an abor-

tion method riskier to the fetus.

Finally, evidence failed to show that, in practice, any differences in risk between alternative abortion methods fall into the shadowy, theoretical "insignificant" area. In fact, the appellees claim that they always use the method least risky to the fetus. App. 48a-49a, ¶182.

ARGUMENT

I. The Court May Review On Appeal A Non-Final Decision Of A Court Of Appeals Holding Unconstitutional A State Statute Because The Jurisdictional Statute Does Not Explicitly Require Finality, Interlocutory Review Is Consistent With The Purposes Supporting An Appeal As Of Right And An Interpretation Permitting Interlocutory Review Is Consistent With Other Jurisdictional Statutes.

In opposing this appeal, appellees argued that appellate jurisdiction was lacking because the Court of Appeals' decision was interlocutory. Motion to Dismiss or Affirm, 7-10. The Court, in granting plenary review, postponed the question of jurisdiction to the hearing on the merits. Order of April 15, 1985. Because a requirement of finality comports neither with the language, nor the purpose of the statute (28 U.S.C. §1254 (2)), the Court should take jurisdiction over this appeal.

A. Slaker v. O'Connor, 278 U.S. 188 (1929) Should Be Reconsidered Because The Court Failed To Properly Apply The Plain Language Of The Jurisdictional Statute.

Appellants appealed to this Court pursuant to 28 U.S.C. §1254(2), which permits an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . of the United States . . . ."[8] The statute, by its

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[8]Appellees generally concede that the statutory provisions which are the subject of this appeal were declared unconstitutional by the Court of Appeals. They argue, however, that the ruling regarding Section 3206 is not appealable because the Court of Appeals merely held that rules were required. Motion to Dismiss or Affirm, 7 n.4. But if this was not a ruling that, absent rules, the statute is unconstitutional, the only remaining possibility is that somehow the absence of rules violated state law. But appellees never raised a state law claim and the Court of Appeals did

FOOTNOTE CONTINUED ON NEXT PAGE

terms, does not require that a decision must be final in order to permit an appeal. Nevertheless, in Slaker v. O'Connor, 278 U.S. 188 (1929), the Court read into the predecessor statute a requirement of finality.[9] Slaker was followed without comment in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). More recently, however, the Court has questioned "the continuing vitality of the 'finality' requirement in the context of §1254(2), which unlike

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

not purport to adjudicate such a claim. If it had, it would have exceeded the limits on federal court jurisdiction imposed by the Eleventh Amendment. Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984).

[9]Section 1254(2) is substantially identical to Section 240(b) of the Judiciary Act of 1925, 43 Stat. 939, the provision involved in Slaker.

such jurisdictional statutes as 28 U.S.C. §§1257 and 1291 has no 'finality' provision in the statute itself." New Orleans v. Dukes, 427 U.S. 297, 301-302 (1976) (per curiam).

Slaker should not be followed for several reasons. First, as the Court observed in New Orleans v. Dukes, supra, the Slaker Court never explicitly considered the language of the statute which, in contrast to other jurisdictional statutes, contains no express finality requirement. Second, the Court never considered, perhaps because the jurisdictional issue was not briefed or argued, the arguments that the purpose of the statute and the general scheme for appellate review of federal court decisions enjoining state laws support review of non-final decisions. Finally, Slaker provides no real analysis of the issue; indeed, its conclusions may be

dictum in light of the undisputed fact that "none of [the claims] questioned the validity of a state statute." Slaker v. O'Connor, supra, 278 U.S., at 189.[10]

For these reasons, the Court should take this occasion to re-examine the question whether an appeal under Section 1254(2) lies only from a final judgment.

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[10]The cases upon which Slaker relies, Collins v. Miller, 252 U.S. 364 (1920) and Martinez v. International Banking Corp., 220 U.S. 214 (1911), do not support the result it reaches. Collins dealt with a direct appeal from a district court order under §238 of the Judicial Code, 36 Stat. 1157. That same code permitted appeals to this Court from non-final judgments of the courts of appeals where the amount in controversy exceeded $1,000. Martinez construed a provision governing appeals from the Supreme Court of the Philippine Islands, which expressly applied only to final judgments, 32 Stat. 695, §10.

B. An Appeal May Be Pursued Under Section 1254(2) From A Non-Final Order Because The Legislation Which Produced That Provision And The Purposes Which Underlie It Point Clearly To A Congressional Purpose To Facilitate This Court's Review Before A Final Judgment

Section 1254(2) originated as Section 240(b) of the Judiciary Act of 1925, 43 Stat. 939. This provision was inserted into the legislation during the Senate debate. 66 Cong. Rec. 2919, 2925 (1925). The motivation for the amendment was the Senate's concern that there be mandatory Supreme Court review of decisions striking down state statutes, particularly since an appeal was permitted to the Supreme Court from a decision of the highest court of a state upholding a state statute in the face of a federal constitutional claim. 66 Cong. Rec. 2919, 2923-2924 (1925). See also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675-677 n.11 (1974), quoting

F. Frankfurter and J. Landis, The Business of the Supreme Court 277-278 (1928). There was no mention in the debate of the finality issue. But a review of the sections enacted along with Section 240(b) leads inescapably to the conclusion that, had Congress desired to impose a finality requirement, it would have done so explicitly.

First and foremost, the "parallel" provision authorizing appeals from state court decisions explicitly applied only to "[a] final judgment or decree." 43 Stat. 937, §237(a) (emphasis added). Second, the 1925 Act preserved the right of direct appeal to this Court from interlocutory orders of district courts granting or denying injunctions against state statutes and added a provision permitting an appeal "from a final decree granting or denying a permanent injunction" 43 Stat. 938, §238(3) (emphasis added). Third, the circuit courts of appeals were given jurisdiction over "final decisions" of district courts. 43 Stat. 936, §128(9) (emphasis added). Had Congress desired to limit Section 240(b) to final orders, it would have stated so clearly, as it did in the provisions outlined above. See 12 J. Moore, H. Bendix and B. Ringle, Moore's Federal Practice ¶ 435.01 [4], P. 6-60 (1982).

In addition to the plain language of Section 1254(2), the very reasons which undergird the statute support the argument that finality is not required. As one Senator observed during the debate, decisions nullifying state laws "go to the very structure of our Government." 66 Cong. Rec. 2757 (1925) (remarks of Sen. Swanson). That structure is severely weakened if erroneous injunctions against enforcement of state

statutes are permitted to remain in effect indefinitely before there arises a right to this Court's review.

There is no case which demonstrates better than this one the consistency between permitting an appeal from a non-final order and the purposes which underlie the appeal statute. Here, a court of appeals, at the earliest possible point in the litigation, has taken it upon itself to declare unconstitutional and enjoin a state statute. Still to be accomplished in the District Court is the full range of discovery which a case of this magnitude necessarily will require; a trial and ruling on the merits of appellees' numerous remaining claims; yet another appeal to the Third Circuit; and, possibly, review by this Court. During all this time, absent a right to appeal to this Court, it is likely that the Court of Appeals' initial, perhaps

erroneous, injunction would remain in effect.[11] Indeed, it would be rather a hollow victory for the Commonwealth and its citizens to succeed in having the injunction removed only after many years of litigation.

It would be at least ironic if the Court concluded that the scenario described above was consistent with the

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[11] There is, of course, the possibility that a non-final order could be entered by a district court permanently enjoining portions of a state statute while proceedings continue on other aspects of the law. But regardless whether such an order could be appealed immediately pursuant to 28 U.S.C. §1292(a)(1), compare Switzerland Cheese Assoc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) (holding that interlocutory review under §1292(a)(1), in certain circumstances, may be sought to review a permanent injunctive order), with Goldstein v. Cox, 396 U.S. 471 (1970) (holding that, based on the particular history of 28 U.S.C. §1253, direct review in the Supreme Court does not lie from interlocutory orders denying injunctive relief), the district court could certify the ruling as final permitting the normal appeal process to go forward immediately.

intent of Congress in 1925. That Congress, in the same measure which included the predecessor of Section 1254(2), specifically reaffirmed the right to appeal directly to this Court from interlocutory injunctions of district courts enjoining the enforcement of state laws. 43 Stat. 938, §238(3). This points unmistakably to the conclusion that Congress had no intention to limit an appeal under Section 1254(2) to a final order.

To be sure, as appellees concede (Motion to Dismiss or Affirm, 10-11), certiorari is available at this time to review the Court of Appeals' ruling. See Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975). But this does not undercut the importance of providing an appeal as of right. The Court has stressed the limited circumstances under which it will review on certiorari inter-

locutory orders. American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372, 384 (1893). While this rule no doubt is a prudent one, Congress in 1925 expressed in the clearest terms possible its belief that review of decisions enjoining state statutes should not be entrusted to discretionary review. See 66 Cong. Rec. 2754 (remarks of Sen. Copeland), 2756 (remarks of Sen. Walsh), 2920-2922 (correspondence between Chief Justice Taft and Sen. Copeland). The rule which we advocate is far more consistent with the intent underlying Section 1254(2) than one which permits only discretionary review.

We recognize, of course, that there is a strong federal policy disfavoring piecemeal review. Flanagan v. United States, No. 82-374 (Feb. 21, 1984), slip op. at 4-5. The Court, likewise, has stressed that "statutes

authorizing appeals are to be strictly construed." Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 43 (1983). But "a jurisdictional statute . . . must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 212 (1968). It is for Congress to weigh the competing concerns of the appellate dockets; this Court has the responsibility to ensure that there is no reduction of the jurisdiction prescribed by Congress. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181-182 (1955), quoted in Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 n.28 (1978). Whatever may be the importance of the finality rule in conserving the courts' resources, in cases such as this one there are at work

policies of greater importance than the avoidance of piecemeal review. In 1925, by a variety of measures, Congress sought to guarantee expeditious, complete review by this Court of decisions enjoining state statutes. The Court will be true to the intentions of Congress only if it permits this appeal.[12]

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[12]If the Court concludes that appellate jurisdiction is lacking, we urge the Court, pursuant to 28 U.S.C. § 2103, to grant certiorari. As the arguments which follow fully demonstrate, the Court of Appeals in this case substantially "departed from the accepted and usual course of judicial proceedings" and "decided . . . federal question[s] in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1 (a),(c).

II. The Court of Appeals Exceeded The Proper Scope Of Its Review In Declaring Unconstitutional Provisions Of State Law On Appeal From A District Court Decision Which Was Limited To A Ruling On A Motion For Preliminary Injunction.

The Court of Appeals held unconstitutional ten separate provisions of Pennsylvania law.[13] Although acknowledging that the appeal before it was from a ruling on a motion for a preliminary injunction, the court held that it could address the merits because of the "unusually complete factual and legal presentation." J.S. App. 2la. Because the Court of Appeals clearly exceeded the proper scope of its review in a manner which may unfairly foreclose defense of the disapproved provisions at trial, the judgment should be vacated

[13] 18 Pa. Cons. Stat. Ann. §§3205, 3206, 3208, 3210 (b) and (c), 3211(c), 3214(a),(b) and (h), 3215(e) (Purdon 1983). Addendum, at 9a-44a.

and the case remanded for entry of an appropriate order.

When ruling on a motion for a preliminary injunction, a district court must balance several factors -- chiefly, whether the plaintiff has demonstrated "that in the absence of [a preliminary injunction] . . . he will suffer irreparable injury and also that he is likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). See also University of Texas v. Camenisch, 451 U.S. 390, 393 (1981); Brown v. Chote, 411 U.S. 452, 456 (1973). On appeal from a preliminary injunction order, the reviewing court decides only whether the grant or denial of a preliminary injunction was an abuse of discretion. Doran v. Salem Inn, Inc., supra, 422 U.S., at 932; Brown v. Chote, supra, 411 U.S., at 457.

When faced in the past with the

question presented in this case, the Court unequivocally expressed its disapproval of attempts to rule on or litigate the merits when the court is faced solely with a motion for preliminary injunction. In Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940), the Court held that a three-judge District Court "committed serious error in thus dealing with the [merits of] the case upon motion for a temporary injunction." See also Withrow v. Larkin, 421 U.S. 35, 43 (1975) (District Court's initial judgment, later corrected, improperly declared unconstitutional state statute on motion for preliminary injunction). Similarly, in Brown v. Chote, supra, the Court rejected the appellant's attempt to secure a ruling on the merits in the course of an appeal from a preliminary injunction order. 411 U.S., at

456-457.[14]

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[14]Of course, this rule is not so inflexible as to require that a suit be tried to a final hearing when it appears to the appellate court that the plaintiff's claim is entirely without merit. Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Meccano, Ltd. v. John Wanamaker, New York, 253 U.S. 136 (1920); Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 485 (1900). But this exception to the normal rule has been applied only to consideration of the question whether the action should be dismissed because the plaintiff's complaint or proofs plainly failed to reveal a good claim. See Deckert v. Independence Shares Corp., supra, 311 U.S., at 287; Mast, Foos & Co. v. Stover Manufacturing Co., supra, 177 U.S. at 494-495. The Court has squarely rejected the argument that, on appeal from a preliminary injunction, a court of appeals may enter a final decree in favor of the plaintiff; a defendant "is entitled to his day in court with opportunity to set up and establish his defenses." Meccano, Ltd. v. John Wanamaker, New York, supra, 253 U.S., at 142. Recently, in Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (January 12, 1984), there was some disagreement among members of the Court regarding the nature of its inquiry. See Slip op., at 10 n.8 (majority concluded that its scope of review was broader than "abuse of discretion" because the District Court reached the merits); slip op., at 4 (Stevens, J.,

FOOTNOTE CONTINUED ON NEXT PAGE

The rationale for the rule limiting an appellate court's power to resolve the merits on appeal from a preliminary injunction order lies in "the significant procedural differences between preliminary and permanent injunctions." University of Texas v. Camenisch, supra, 451 U.S., at 394. The limited purpose of a preliminary injunction is to maintain the status quo pending a final ruling on the claims; this purpose

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concurring; preliminary injunction an abuse of discretion); slip op., at 7 (O'Connor, J. concurring; the Court concluded that issuance of a preliminary injunction was an abuse of discretion because plaintiffs had no chance of success on the merits); slip op., at 9-10 (three dissenting Justices would hold that the question simply was whether issuance of a preliminary injunction was an abuse of discretion). None of the opinions suggest, however, that Mayo is infirm or that judgment against defendants may be entered on appeal from a preliminary injunction order.

frequently requires that proceedings be conducted hastily "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Id., at 395. There is no requirement or expectation that a party must present his case on the merits at a preliminary injunction hearing. Ibid. The findings of fact and conclusions of law rendered in the preliminary injunction hearing are not binding at a hearing on the merits. Ibid. Even if the parties or the district court desires a consolidation of the trial on the merits with the hearing on the preliminary injunction motion, "'the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will afford the parties a full opportunity to present their

respective cases.'" Id., at 395, quoting Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1057 (CA 7 1972) (alteration in original).

Much like the proceedings reviewed in University of Texas v. Comenisch, supra and Brown v. Chote, supra, this case proceeded with great haste. The motion for a preliminary injunction was filed on October 29, 1982- more than four months after the Act was passed, but only a few weeks before it was to take effect. Follcwing a conference with counsel, on November 18, 1982, the District Court, in an order expressly limited to the motion for preliminary injunction, directed the parties to submit by November 30 a stipulation of uncontested facts; a comprehensive statement of contested facts, but with the proviso that "no party may contest a

fact unless it is prepared to present evidence regarding that fact at the preliminary injunction hearing [scheduled for December 2]; and, a list of witnesses, together with a brief statement of the testimony to be presented by each witness. J. S. App. 274a-278a. Although not mentioned in the District Court's order, the appellants also were obliged to produce for the hearing a lengthy brief addressing the many constitutional issues raised in the motion. Although this procedure may have been necessary in view of the impending December 7 effective date of the statute, it hardly represents an acceptable basis for a final ruling striking down provisions of state law. Brown v. Chote, supra, 411 U.S., at 457.

In fact, an examination of the stipulation reveals that it is decidedly one-sided in favor of the appellees. Of

the 229 paragraphs which comprise the stipulation, only a miniscule percentage arguably can be read as favorable to appellants' position below (Stipulation of Uncontested Facts, ¶'s 84, 87, 91, 93, 97, 102, 106, 107, 128, 130, 144, 176, 179, 193). The reasons for the lopsided record are apparent: although the statute was passed in June of 1982, the complaint was not filed until October and the motion for a preliminary injunction was filed on October 29; during this period the appellees plainly were gathering the facts which they presented in the 40 affidavits (comprising two volumes of material) attached to their motion for preliminary injunction. As could be expected, the appellants were hardly in a position, only a few short weeks later, to produce contradicting evidence. For this reason, the stipulation largely mirrors appellees' affida-

vits. The Court of Appeals, perhaps, was correct in labeling the factual record "unusually complete" (J.S. App. 21a), but only from appellees' perspective.

Appellants here find themselves in much the same position as the appellants in Mayo v. Lakeland Highland Canning Co., supra - "the court's opinion decid[ing] a question which was not open on the hearing . . . prejudices their position on final hearing . . . ." 309 U.S., at 316-317. Moreover, this point may not, as appellees argue, be glossed over simply by concluding that the statutory provisions are "unconstitutional as a matter of law" and "no factual record that might be developed on remand could alter this result." Motion to Dismiss or Affirm, 12. Mayo clearly precludes this argument. But even if it did not, appellants fully intend to present to the District Court a complete factual

record which, in their view, could affect the disposition of this case.

Without intending to present an exhaustive explication of their case, especially in the absence of any discovery, appellants intend to present evidence, at least, in the following areas:

1. Informed Consent and Printed Information - a significant number of women who undergo abortions are not presented with information necessary for them to make an informed choice. The limited information required to be provided by Pennsylvania's statute is medically accurate. This information must be provided to ensure a truly informed choice and the effects produced by ignorance are far more dangerous to the woman's health in the long-run.

2. Parental Consent/Judicial Approval for Minors - evidence will be pro-

duced to show that the procedures for judicial approval prescribed in the statute and court rules, in practice, provide an expeditious, confidential procedure for judicial approval of minors' requests for abortions.

3. Abortion After Viability Provisions - there are many cases in which, without risk to the woman's health, an abortion technique may be used which, in contrast to other available techniques, offers a far greater chance for survival of the fetus. The relative risks to the mother's health of the various available abortion methods are ascertainable. Finally, the characteristics of viable fetuses may justify awaiting a second physician, depending upon the risk to the woman. Evidence will show instances in which there have been live births but insufficient care has been provided to the child.

4. Reporting Requirements - the information which must be reported is vital to medical research and will serve the interests of maternal and fetal health. The information is of a nature which is, or should be, gathered in each case and the additional effort required in filling out the forms is minimal.

This and other evidence which appellants may present certainly could alter materially the analysis of the constitutional issues presented by this case. The District Court and the parties anticipated this change in focus; the court carefully limited its consideration to the preliminary injunction question and the parties so limited their stipulation. J.S. App. 176a n.1, 270a-272a, 274a-278a; App. 9a-10a. In light of the haste with which the case proceeded in the District Court, the lack of notice or expectation on the appellants' part

that a ruling on the merits would eventuate and the substantial additional evidence which appellants intend to offer at trial, the "resulting record [produced below] was simply insufficient to allow [the Court of Appeals] . . . to consider fully the grave, far-reaching constitutional questions presented." Brown v. Chote, supra, 411 U.S., at 457.

Although we argue in the following sections of this brief that the portions of the statute at issue here may be upheld on this record, they certainly may not be enjoined permanently at this stage. On this ground alone, the judgment should be vacated.

III. The Provisions of Pennsylvania's Abortion Control Act Held Unconstitutional By The Court of Appeals, In Fact, Are Consistent With This Court's Decisions.

The Court of Appeals, based upon its view of the law and the limited record presented below, declared unconstitutional provisions of Pennsylvania's Abortion Control Act dealing with informed consent (Section 3205), parental consent or judicial approval of abortions for minors (Section 3206), printed information (Section 3208), abortions after viability (Section 3210(b) and (c)), and reporting requirements for abortion providers (Sections 3211(a); and 3214(a),(b) and (h)). As we have argued, Part II, supra, if these provisions require evidentiary support to be sustained, appellants are prepared to present the necessary proofs at trial. But it is, nevertheless, within the Court's

power to decide that, on the face of the complaint and the proof offered by the appellees (plaintiffs) below, the provisions in question are constitutional. See p. 38-39 n. 14, supra. For these reasons, we address in the arguments to follow the merits of the constitutional challenges to the statute.[15]

Little more than two years ago the Court examined a number of state and municipal provisions regulating the performance of abortions. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (hereinafter "City of Akron"); Planned Parenthood Assoc. of

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[15]We have not appealed at this time the Court of Appeals' ruling striking down 18 Pa. Cons. Stat. Ann. §3215(e) (Purdon 1983) (relating to coverage for abortions in insurance policies). Appellants have not abandoned defense of this provision (see Jurisdictional Statement, 4 n.3) and appellees concede that an appeal may be taken after final judgment in the District Court. Motion to Dismiss or Affirm. 10 n.5.

Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) (hereinafter "Ashcroft"); Simopoulos v. Virginia, 462 U.S. 506 (1983). Because Pennsylvania's regulations at issue here are similar to many of the provisions examined in the recent cases, we largely confine ourselves to a discussion of those cases.

The Court reaffirmed in City of Akron the validity of Roe v. Wade, 410 U.S. 113 (1973) and the cases since Roe which have refined the standard for review of abortion regulations. 462 U.S., at 426-431. There remains the familiar framework: regulations affecting the abortion decision which are reasonably related to the State's compelling interest in maternal health are permissible after the first trimester; and because the state has a compelling interest in the preservation of potential life after viability, regu-

lations governing, even proscribing, abortions are permissible after viability (roughly the beginning of the third trimester), if reasonably related to the State's compelling interest and not destructive of maternal life or health. Id., at 427-428. Finally, regulations which operate during the early weeks of pregnancy but "that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives." Id., at 430.[16]

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[16]In addition, The State properly may assert interests in protecting children which justify regulations not permissible for adults. City of Akron, 462 U.S., at 427-428 n. 10.

A. Pennsylvania's Statute Requiring Attendance Of A Second Physician During Abortions Performed After Viability Is Constitutional Because The Statute Contains A Medical Emergency Exception Every Bit As Explicit As The Statute Upheld In Ashcroft.

Section 3210(c) of the Pennsylvania statute requires that a second physician, whose job it is to care for the child, be present during abortions performed after viability.[17] In Ashcroft, the Court upheld Missouri's second-physician requirement finding that it was justified by the State's compelling interest in preserving potential life. 462 U.S., at 476-477 (Powell, J., joined by the Chief Justice); at 505 (O'Connor, J., joined by White, J., and Rehnquist, J., concurring in part in the judgment and dissenting in part). In

[17]Section 3210(c) is reprinted in the Addendum, at 28a-29a.

light of this holding, the Court of Appeals did not conclude that a second-physician requirement for post-viability abortions necessarily is impermissible. J. S. App. 71a-72a. Rather, the court read Ashcroft to require a "clearly expressed" exception to the second-physician requirement for "medical emergencies." J.S. App. 72a-73a. The Court then held that Pennsylvania's statute did not meet this standard. The Court's decision represents both an incorrect reading of Ashcroft and an incorrect application of the standard.

Of the five Justices who voted to uphold Missouri's statute, three made no mention of the explicit exception required by the Third Circuit. 462 U.S., at 505 (O'Connor, J., joined by White, J., and Rehnquist, J., concurring in part in the judgment and dissenting in part). Clearly, a statute which

includes at least the protections offered by Missouri's provision would be approved by those Justices. Likewise, Justice Powell, joined by the Chief Justice, did not conclude that there must be an explicit exception for emergencies. Rather, he was satisfied with an implicit exception to the second-physician requirement which he read into the proviso "'that it [the steps taken by the second physician to preserve the fetus] does not pose an increased risk to the life or health of the woman.'" Id., at 485 n. 8, quoting Mo. Rev. Stat. §188.030.3 (Supp. 1982). So contrary to the holding of the Court of Appeals, five Justices voted to uphold Missouri's statute despite the absence of an

express emergency exception.[18]

Pennsylvania's statute is far more explicit than was Missouri's. In the general provisions found at the beginning of Section 3210 the Legislature provided, "It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he concluded in good faith, in his best medical judgment . . .

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[18]Four Justices, in an opinion authored by Justice Blackmun, concluded that an exception for emergencies must be express and that a second-physician requirement is permissible only if narrowly drawn to exclude circumstances in which the abortion method precludes survival of the fetus. 462 U.S., at 498-503 (Blackmun, J., concurring in part and dissenting in part). As to the second point, Pennsylvania's statute satisfies Justice Blackmun's concerns by limiting its requirements to "an abortion the method chosen for which, in [the physician's] good faith judgment, does not preclude the possibility of a child surviving the abortion." 18 Pa. Cons. Stat. Ann. §3210(c) (Purdon 1983), Addendum, at 28a.

that the abortion was necessary to preserve maternal life or health." 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983) (emphasis added), Addendum, at 27a. Of course, Section 3210(c) is a part of the "section" referred to in part (a). The Court of Appeals ignored the Legislature's clearly expressed intent in rejecting application of this exception to Section 3210(c). See J.S. App. 144a-146a (Chief Judge Seitz dissenting on the ground that the exception for emergencies is express).

Appellees' argument (Motion to Dismiss or Affirm, 19-20) that this reading of the statute does not square with the more restrictive general definition of "medical emergency" (18 Pa. Cons. Stat. Ann. §3203 (Purdon 1983)) misses the mark. The phrase "medical emergency" has no intrinsic magic - it may mean different things in

different circumstances. Whatever may be required in other contexts, the point here is plain - five Justices in Ashcroft found sufficient to pass muster a provison which, although somewhat ambiguous in its application to an emergency precluding attendance of a second-physician, could be read as providing an exception to the second-physician requirement where the requirement would pose an increased risk to the woman's "life or health." Pennsylvania's statute provides an exception in identical terms and is expressly made applicable to the second-physician provision. Under these circumstances, not only does the statute suffice under Justice Powell's opinion, it also provides the express exception on which the dissenters in Ashcroft insisted. The judgement of the Court of Appeals as to Section 3210(c) should be reversed.

B. The Requirement That Physicians File Reports Containing Information Relating To Abortions And Complications From Abortions Is Constitutional Because It Creates No Significant Impact On The Exercise Of The Abortion Decision And Is Directly Related To Important State Health Objectives.

Section 3214(a), (b) and (h)[19] prescribe reporting requirements for abortions and abortion complications. The Court of Appeals struck down these provisions because of its views that completing the forms will increase costs, the information requested is too detailed, and the requirement that a physician report a basis for certain medical judgments could chill physicians' willingness to perform abortions. J. S. App. 79a-81a. Because the Court of Appeals failed to apply properly this

[19]Sections 3214(a), (b) and (h) are reproduced in the Addendum, at 31a-33a, 40a-42a.

Court's precedents, its ruling must be reversed.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81 (1976), the Court concluded that record-keeping requirements for abortions are "useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." (Footnote omitted). To this day "questions remain as to the long-range complications [of abortions] and their effect on subsequent pregnancies." Ashcroft, 462 U.S., at 487-488 (Opinion of Powell, J.). Reports on abortions, including "complication reports, provide a statistical basis for studying the complications." Ashcroft, 462 U.S., at 488 (Opinion of Powell, J.). There can be little question that the reports required by Pennsylvania are

useful in studying abortion and its complications. In fact, the requested information, in many respects, corresponds to information gathered by the federal Centers for Disease Control. See Department of Health and Human Services, Centers for Disease Control, Abortion Surveillance: Annual Summary 1979-1980, p. 3-9, 30, 34-42 (1983). Certainly, there is no requirement imposed which restricts or regulates the physician's medical judgment or in any manner influences the woman's exercise of her right of choice.[20]

The Court of Appeals apparently

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[20]There is no basis in the record, or logic, for the Court of Appeals' conclusion that reporting requirements, which require physicians to report the basis for certain medical judgments, will influence physicians not to perform abortions. Certainly professionals may be required to document their decisions. The information requested serves useful medical/statistical purposes and provides a guide for further legislative action.

was persuaded by the amount of information to be reported that these requirements violated the Court's caution in Danforth that reporting not be "overdone" so as to "accomplish, through the sheer burden of recordkeeping detail," a restriction on abortions. 428 U.S., at 81. See J.S. App. 79a-80a. But an examination of the reporting forms reveals that they are easily completed by checking blocks or filling in blanks. Addendum, at 55a-57a. There is no evidence that substantial time will be required for clinic personnel to complete these forms, especially since the information requested clearly is of a type routinely gathered or instantly observable. The most that appellees are able to show is that their current practices will need to be modified and any unspecified cost increases will be passed on to their patients. App. 51a, ¶194. But it

hardly could be argued that the cost of filling in these simple forms will exceed the cost of the pathology examination and report found in Ashcroft to be a "relatively insignificant burden." 462 U.S., at 490 (Opinion of Powell, J.); 505 (O'Connor, J. concurring in part in the judgment and dissenting in part; "no undue burden").[21]

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[21] In the course of its holding, the Court of Appeals struck down related provisions requiring preparation of statistical compilations (with protection for the confidentiality of the patient and the person filing the report), 18 Pa. Cons. Stat. Ann. §3214(e) (Purdon 1983), and for a physician to report the basis for his judgment that abortion of a viable fetus was necessary to preserve maternal life or health, 18 Pa. Cons. Stat. Ann. §3211(a) (Purdon 1983). J.S. App. 75a-77a, 82a. Of course, our argument that the reporting requirements are valid subsumes the related contention that the information gathered from these reports must be made available if it is to be useful. As to Section 3211(a) we note Chief Judge Seitz's dissent in which he points out that this provision never was challenged

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The reporting requirements are justified by important state health objectives and are not so costly as to amount to a significant burden on the abortion decision. The judgment of the Court of Appeals should be reversed.

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by appellees. J.S. App. 146a. Certainly, appellees never challenged the requirement that a determination be made whether the fetus is viable. Section 3211(a) is not objectionable since it requires no more than a statement of the "good faith" basis for the physician's judgment. See Danforth, supra, 428 U.S. at 63-64 (dictum); at 89 (Stewart, J. concurring). Moreover, it is untenable to suggest that the State may not require verification of the basis for third-trimester abortions in order to insure that its compelling interest in protecting life is not improperly thwarted.

C. Pennsylvania's Requirements For Informed Consent Are Constitutional Because They Require Only The Provision Of Relevant Information Which Is Not Designed To Influence The Woman's Choice Between Childbirth And Abortion.

Section 3205(a) of Pennsylvania's statute requires that a woman give her informed consent to an abortion.[22] The statute sets forth several general categories of information which must be provided to the woman to insure informed consent. The Court of Appeals held that this provision must fall because it is too specific and is not severable from the requirement that some of the information must be provided by a physician. See J. S. App. 46a-50a. The court's conclusions are without merit.

A State may require that a woman give informed written consent for an

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[22]Section 3205(a) is reproduced in the Addendum, at 9a-13a.

abortion. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976). This includes information regarding "just what would be done and its consequences." Ibid. "[T]he state legitimately may seek to ensure that [the decision] has been made 'in light of all the attendant circumstances - psychological and emotional as well as physical - that might be relevant to the well-being of the patient.'" City of Akron, 462 U.S., at 443, quoting Colautti v. Franklin, 439 U.S. 379, 394 (1979). Nevertheless, the state may not require a physician to deliver information which is designed to influence the woman's choice. City of Akron, 462 U.S., at 443-444.

In City of Akron, the Court found objectionable an extraordinarily specific informed consent ordinance which required that physicians provide

each woman a litany of information, described by the Court as a "parade of horribles", much of which was of "dubious" validity and plainly designed to influence the woman's choice. Id., at 444-445. The Court indicated, however, that statutes "describing the general subject matter relevant to informed consent," id., at 445, and "describ[ing] in general terms the information to be disclosed", id., at 447, are permissible. Pennsylvania's statute meets this test.

Section 3205(a)(1)(i) requires that the woman be told who will perform the abortion. This is an entirely sensible, non-influential piece of information. Appellees hardly can be heard to argue that they should be permitted to keep the physician's identity a secret from the patient.

Section 3205(a)(1)(ii) requires that the woman be informed "that there may be detrimental physical and psychological effects which are not accurately foreseeable." This provision was carried forward from a prior Pennsylvania statute which was upheld against the precise challenge leveled here. Planned Parenthood Assoc. v. Fitzpatrick, 401 F.Supp. 554, 586-588 (E.D. Pa. 1975) (three-judge court), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976).[23] In fact, the order in

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[23]The prior Pennsylvania statute defined "informed consent" to require that the pregnant woman be advised "(i) that there may be detrimental physical and psychological effects which are not foreseeable, (ii) of possible alternatives to abortion, including childbirth and adoption, and (iii) of the medical procedures to be used." Pa. Stat. Ann. tit. 35, §6602 (Purdon 1977). The question presented in Franklin is precisely the one presented here as to the items of information common to the two statutes:

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Franklin indicates specifically that the affirmance is on the strength of Danforth.[24]

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> Do Pennsylvania Abortion Control Act's "informed consent" provisions invade constitutionally protected privacy of physician-patient relationship by dictating content of physician's counseling of woman with regard to abortion decision, regulate abortions more stringently than other medically indistinguishable procedures, and impose restrictions upon abortion during first trimester of pregnancy inconsistent with U.S. Supreme Court's holding in Roe v. Wade, 410 U.S. 113, 42 LW 4313 (1973)?

Juris. Statement in Franklin v. Fitzpatrick, O.T. 1975, No. 75-772. The question being squarely presented, the affirmance controls the issue here. Illinois Election Board v. Socialist Workers Party, 440 U.S. 173, 182 (1979).

[24]The evidence offered by appellees below included the assertion that informing women that there may be unforeseeable detrimental effects from an abortion would not be in the best medical interest of a woman because, "standing alone" this information will be confusing and of little help in influencing her decision. App. 43a-44a, ¶105. Assuming that this statement is

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Section 3205(a)(1)(iii) requires that the woman be given "medically accurate" information on the "particular medical risks" associated with her abortion; and sub-part (v) requires that similar information be provided for childbirth. Of course, the Court has held that the State may seek to ensure that a woman is enlightened as to the consequences of her choice. City of Akron, 462 U.S., at 442-443, 446-447; Danforth, 428 U.S., at 67. The statute does no more than guarantee provision of this highly relevant, accurate information.

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> correct, what appellees fail to appreciate is that physicians or counsellors are free to, and should, give additional information which tailors the explanation to each woman's personal circumstances. It scarcely may be argued that there are not always unforeseeable potential effects from medical treatment and that all patients should not be cautioned of this possibility.

Section 3205(a)(1)(iv) provides that a woman should be informed of the probable gestational age of the fetus. This is a provision which requires only the offering of accurate, relevant, non-judgmental information - a type of information the Court found "certainly . . . not objectionable" in City of Akron, 462 U.S., at 445-446 n. 37.

The information outlined in Section 3205(a)(2) likewise is unobjectionable. Subparts (i) and (ii) provide that information be given on the help available should childbirth be chosen - medical assistance benefits and support payments. Finally, the woman, may, but only if she expressly chooses to do so, review materials which describe the unborn child and list agencies to help her. Section 3205(a)(2)(iii). Again, the Court has found permissible a requirement that information be supplied

on the "availability of assistance" for pregnant women. City of Akron, 462 U.S., at 445-446 n. 37. Certainly, information on the availability of optional materials is not objectionable. Appellees never have argued that women should not be provided with relevant information which they request.

So it is clear that each item of general information outlined in Pennsylvania's statute comports with this Court's prior holdings on the permissible scope of informed consent regulations. Appellees, relying on City of Akron, then are left with the argument that the statute nevertheless must fall because, as to the items listed in subsection (a)(1), the statute requires that a physician personally convey the information. Motion to Dismiss or

Affirm, 21-22.[25] But there are controlling differences between City of Akron and this case.

We expressly argue, as the City apparently did not, that the physician-counselling requirement is entirely severable from the information requirements. In each case, severability is a question the answer to which turns on legislative intent: would the Legislature have approved the statute with the offending provisions removed. See Carter

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[25]Appellees also appear to argue that Pennsylvania's statute is infirm because it requires that a "litany" of information be provided in every case. Motion to Dismiss or Affirm, 22. But City of Akron and Franklin v. Fitzpatrick dispose of any argument that the State may not give general guidance on the categories of information to be covered in obtaining informed consent. As we outline in the text, the categories of information described in Pennsylvania's statute either have been specifically approved by the Court or are within the Court's prior descriptions of permissible informed consent statutes.

v. Carter Coal Co., 298 U.S. 238, 312-313 (1936).

Here there is no question that Pennsylvania's Legislature would have passed the informed consent provisions without a physician-counselling requirement. The Act has a broad severability clause. Act No. 1982 - 138, §5, 1982 Pa. Legis. Serv. 750, 794 (Purdon), Addendum, at 45a. The Legislature strongly indicated its intention to have in force an appropriate statute regulating abortion when, after a gubernatorial veto of an earlier measure, it approved this revised statute. See J.S. App. 13a-14a. Finally, the Pennsylvania Legislature did not attach to physician-counselling the importance ascribed to it by the City of Akron; one portion of the statute expressly permits counselling by other personnel. Section 3205(a)(2).

As Judge Weis pointed out in dissenting from the denial of rehearing, there are "significant differences" between Pennsylvania's statute and Akron's ordinance. J.S. App. 163a-164a. The Pennsylvania statute requires no parade of horribles and has no single-minded compulsion for physician-counselling. Under the standards laid down in City of Akron and Danforth, this statute must be upheld.

D. The Parental Consent/Judicial Approval Provisions Are Constitutional Because They Provide An Adequate Alternative To Parental Consent For Minors And There Is An Appropriate Framework For Confidential, Expeditious Judicial Proceedings.

Pennsylvania requires that unemancipated minors secure parental consent or judicial approval for an abortion. Section 3206.[26] The Court of Appeals held that the statute meets the standards for minor consent statutes prescribed by this Court. J.S. App. 50a-52a. But the court's concerns with the "procedural inadequacies" of the statute caused it to enjoin the provision pending more detailed rules from the State courts. This holding was not warranted at the time; it is all the more unsupportable now in light of new,

[26]Section 3206 is reproduced in the Addendum, at 14a-22a.

detailed rules issued after the court's decision.

The Court of Appeals was concerned that the statute did not provide adequately for expeditious, confidential judicial approval proceedings. J.S. App. 56a. The statute itself (§3206(f), (h))[27] and instructions from Pennsylvania's Chief Justice[28] generally required quick action and confidentiality. The Court of Appeals made no mention of this Court's repeated admonitions in

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[27]Section 3206(f) provides for confidential proceedings on the petition of a minor and a ruling within three days. Subsection (h) requires an expeditious, confidential appeal.

[28]As the Court of Appeals observed, the State Chief Justice instructed the local courts to apply applicable adoption rules, which include confidentiality provisions. See 23 Pa. Cons. Stat. Ann. §§2905-2906 (Purdon 1983).

this precise context that the federal courts must give weight to the State's obligation to follow the dictates of its statute and the Constitution. Ashcroft, 462 U.S., at 491 n. 16 (Opinion of Powell, J.); Bellotti v. Baird, 443 U.S. 622, 645 n. 25 (1976)(plurality opinion).

In any event, Pennsylvania now has new detailed rules, Pennsylvania Orphan's Court Rules 16.1-16.8, Addendum, at 48a-54a,[29] which go far beyond the requirement that provisions on expedition and confidentiality provide a "framework" for a constitutional system of judicial approval.[30] Ashcroft, 462 U.S., at 491

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[29]The new rules are reprinted in 23 Pa. Cons. Stat. Ann. following § 794 (Purdon Supp. 1985).

[30]Based on the new rules, appellants moved in the District Court for a lifting of the injunction against enforcement of Section 3206. App. 53a. The District Court ruled that it was without jurisdiction to rule on the motion because of

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n. 16 (Opinion of Powell, J.). So whatever may be the merits of the Court of Appeals' conclusions, it is now clear that confidential proceedings and speedy action are expressly guaranteed.

The petition for judicial approval need only include the minor's initials. Rule 16.2(a)(1). The woman's name shall not be entered on any public docket and the proceeding shall be closed to all but essential persons such as the minor's parents. Rule 16.4. The record shall be sealed and all documents relating to the proceeding must be impounded. Rule 16.6. Any reported

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the pendency of this appeal. App. 57a. Nevertheless, the Court should address the issue in the context of the law as it stands now. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281-282 (1969).

decision may not disclose the minor's identity. Ibid. Appeals are confidential. Rule 16.8.

In Ashcroft, the Court upheld Missouri's statute, which assured confidentiality by permitting the minor to use her initials on any petition for court approval. 462 U.S., at 491 n.16 (Opinion of Powell, J.). Surely, the detailed confidentiality provisions governing Section 3206 which are outlined above more than meet constitutional standards.

On the issue of expediency, the new rules require that proceedings under Section 3206 be given precedence over other business and mandate that a decision be reached within three business days of the request for court intervention. Rule 16.7. Any appeal also must be expedited; the record must be perfected within five days after the appeal

is filed and a decision must be reached within seven business days after the record is completed. Rule 16.8. The appellate court is required to assign appeals "to a special submission panel of the court for immediate disposition." Ibid.

It is difficult to imagine how the State court could have done more to ensure that Section 3206 proceedings are concluded quickly, while still leaving sufficient time for the courts to consider such important matters. The provisions approved in Ashcroft were far less generous or as detailed-providing only that a hearing must be held within five days, the record on appeal must be perfected within five days, and court rules should prescribe any further details. 462 U.S., at 480 n.4, 491 n. 16 (Opinion of Powell, J.) Clearly, the specific guidelines for expedition of

Section 3206 proceedings fulfill the requirement for quick resolution of minors' petitions.

The new rules similarly meet the Court of Appeals' remaining concerns. The rules establish a clear and simple procedure for the filing of a petition. Rule 16.1. No filing fees are required. Ibid. The required contents of a petition are set forth in concise terms. Rule 16.2(a). Moreover, court personnel are directed to assist the minor in preparing the petition. Rule 16.2(b).

These new detailed, yet easy to follow, rules governing proceedings under Section 3206 clearly are adequate to satisfy any objections to enforcement of Section 3206. Because "abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained 'on demand,'" H. L. v.

Matheson, 450 U.S. 398, 420, n.8 (1981) (Powell, J., concurring), it is imperative that the special provisions of Section 3206 dealing with abortions for minors be implemented as soon as possible. The judgment of the Court of Appeals should be vacated.

E. The Provision Regarding The Selection Of Abortion Technique For Post-Viability Abortions Is Constitutional Because It Does Not Require Sacrifice Of The Woman's Life Or Health.

The Court of Appeals held unconstitutional Section 3210(b) of the Act, which requires a physician performing an abortion on a viable fetus to use the abortion method most likely to produce a live birth, unless "in the good faith judgment of the physician" that method "would produce a significantly greater medical risk to the life or health of the pregnant woman."[31] The court concluded that this type of provision is invalid only if it requires the pregnant woman to sacrifice her life or health for the viable fetus. J.S. App. 69a. See Colautti v. Franklin, 439 U.S. 379,

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[31]Section 3210(b) is reproduced in the Addendum, at 27a-28a.

400 (1979); see also Ashcroft, 462 U.S., at 485 n.8 (Opinion of Powell, J.) (second-physician requirement for abortion of viable fetus permissible provided pregnant woman's life and health not endangered). But the Court of Appeals failed to follow the lead of the District Court in construing the statute so as to preserve its constitutionality. Compare J.S. App. 70a, with J.S. App. 246a-249a.

The question is whether the term "significantly" should be construed to mean, in the context of this statute, a "meaningful" increased risk (as appellants urged) or a "substantial" increased risk (as appellees argued below). In resolving this question we are guided by the Court's repeated admonition that federal courts are required to construe state statutes in a manner which dispels, not creates, constitutional

problems. Ashcroft, 462 U.S., at 493 (Opinion of Powell, J.); United States v. Harriss, 347 U.S. 612, 618 (1954).

As the district court observed, "Websters' Third New International Dictionary defines significant as 'having meaning,' 'having or likely to have influence or effect,' and 'probably caused by something other than chance.'" J.S. App. 248a. Under this certainly permissible view of the critical term, the statute would not require a sacrifice of the pregnant woman's life or health. The District Court's construction of the statue, which certainly was an appropriate one, properly respected this Court's direction to avoid constitutional problems. The Court of Appeals' ruling, on the other hand, failed to respect this principle.

Moreover, there simply is no evidence that there are alternative post-viability abortion methods with marginal, but not "significant" (as appellees view that term), relative risks to women. In fact, the evidence offered by appellees shows that, when performing abortions on potentially viable fetuses, they have "utilized the procedure most likely to preserve the life of the fetus." App. 48a-49a, ¶182. This rather remarkable admission undercuts entirely appellees' argument, since we must assume that they did not select a relatively dangerous abortion technique.

Finally, it is important to note that the statute requires nothing more of physicians than the performance of an everyday task. They merely are asked, initially, to make a good faith judgment as to the relative risks of available

abortion methods for the particular patient. Presumably, this is the type of judgment physicians must make all the time in a variety of circumstances. The statute comes into play only if there is no meaningful difference in the risks; then the physician must choose the method likely to preserve the fetus.

In summary, the statute, even in the abstract, may be construed to avoid any constitutional problem. Moreover, the evidence on which appellees rely fails to show that their objection is anything more than theoretical. The statute should be upheld.

Conclusion

The judgment of the Court of Appeals should be vacated and the case should be remanded for entry of an appropriate order limited to whether the District Court properly ruled on the preliminary injunction motion. In the alternative, the judgment should be reversed to the extent that the Court of Appeals held provisions of state law to be unconstitutional.

Respectfully submitted,

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ADDENDUM

28 U.S.C. §1254(2) provides as follows:

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * *.

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

RELEVANT SECTIONS OF THE
ABORTION CONTROL ACT

18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983)

§ 3202. Legislative Intent

(a) Rights and Interests. -- It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion. It is the further intention of the General Assembly to foster the development of standards of professional conduct in a critical area of medical practice, to provide for development of statistical data and to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term. The General Assembly finds as fact that the rights and interests furthered by this chapter are

not secure in the context in which abortion is presently performed.

(b) Conclusions. -- Reliable and convincing evidence has compelled the General Assembly to conclude and the General Assembly does hereby solemnly declare and find that:

(1) Many women now seek or are encouraged to undergo abortions without full knowledge of the development of the unborn child or of alternatives to abortion.

(2) The gestational age at which viability of an unborn child occurs has been lowering substantially and steadily as advances in neonatal medical care continue to be made.

(3) A significant number of late-term abortions result in live births, or in delivery of children who could survive if measures were taken to bring about breathing. Some physicians

have been allowing these children to die or have been failing to induce breathing.

(4) Because the Commonwealth places a supreme value upon protecting human life, it is necessary that those physicians which it permits to practice medicine be held to precise standards of care in cases where their actions [redacted] may result in the death of an unborn child.

(5) A reasonable waiting period, as contained in this chapter, is critical to the assurance that a woman elect to undergo an abortion procedure only after having the fullest opportunity to give her informed consent thereto.

(c) Construction. -- In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania

shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.

(d) Right of [redacted] It is the [redacted] Common- [redacted] Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing

to obtain, receive, subsidize, accept or provide abortions.

§3203. Definitions

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Abortion." The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus.

"Born alive." When used with regard to a human being, means that the human being was completely expelled or extracted from her or his mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity.

. . . .

"Facility" or "medical facility." Any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein medical care is provide to any person.

. . . .

"First trimester." The first 12 weeks of gestation.

"Hospital." An institution licensed pursuant to the provisions of the law of this Commonwealth.

. . . .

"Medical emergency." That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

"Medical personnel." Any nurse, nurse's aide, medical school student, professional or any other person who furnishes, or assists in the furnishing of, medical care.

"Physician." Any person licensed to practice medicine in this Commonwealth

. . . .

"Probable gestational age of the unborn child." What, in the judgment of the attending physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed.

"Unborn child." For purposes of this chapter, a human being from fertilization until birth and includes a fetus.

"Viability." That stage of fetal development when, in the judgment of the physician based on the particular facts of the case before him and in light of the most advanced medical technology and information available to him, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

§3205. Informed consent

(a) General rule. -- No abortion shall be performed or induced

except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) The woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion or by the referring physician but not by the agent or representative of either.

(i) The name of the physician who will perform the abortion.

(ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable.

(iii) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the

risks of infection, hemorrhage, danger to subsequent pregnancies and infertility.

(iv) The probable gestational age of the unborn child at the time the abortion is to be performed.

(v) The medical risks associated with carrying her child to term.

(2) The woman is informed, by the physician or his agent, at least 24 hours before the abortion;

(i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

(iii) That she has the right to review the printed materials described in section 3208 (relating to printed information). The physician or his agent shall orally inform the woman that the materials describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. If the woman is unable to read the materials furnished her, the materials shall be read to her. If the woman seeks answers to questions concerning any of the information or materials, answers shall be provided her in her own language.

(3) The woman certifies in writing, prior to the abortion, that the information described in paragraphs (1) and (2) has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (2).

(4) Prior to the performance of the abortion, the physician who is to perform or induce the abortion or his agent receives a copy of the written certification prescribed by paragraph (3).

(b) Emergency. -- Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, if the medical indications supporting his judgment that an abortion is necessary to avert her death.

(c) Penalty. -- Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of

1974." Any other person obligated under this chapter to give information relating to informed consent to a woman before an abortion is performed, and who fails to give such information, shall, for the first offense be guilty of a summary offense and, for each subsequent offense, be guilty of a misdemeanor of the third degree.

(d) Limitation on civil liability. -- Any physician who compiles with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P.L. 390, No. 111), known as the "Health Care Services Malpractice Act."

§3206. Parental consent

(a) General rule. -- Except in the case of a medical emergency

except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa. C.S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In obtaining the consent of the woman's parent or guardian, the physician shall provide them the information and materials specified in section 3205

(relating to informed consent), and shall further obtain from them the certification required by section 3205(a)(3). In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

(b) Unavailability of parent or guardian. -If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

(c) Petition to court for consent. -- If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

(d) Court order. -- If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and

capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

(e) Representation in proceedings. -- The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel and shall, upon her request, provide her with such counsel.

(f) Proceedings confidential. -- Court proceedings under this section shall be confidential and shall be given such precedence over other pending

matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman, but in no case shall the court fail to rule within three business days of the date of application. A court of common pleas which conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting its decision and shall order a sealed record of the evidence to be maintained which shall include its own findings and conclusions.

(g) Coercion prohibited. -- Except in a medical emergency, no parent, guardian or other person standing in loco parentis shall coerce a minor or incompetent woman to undergo an abortion. The court shall grant such relief as may be necessary to prevent such coercion. Should a minor be denied

the financial support of her parents by reason of her refusal to undergo abortion, she shall be considered emancipated for purposes of eligibility for assistance benefits.

(h) Regulation of proceedings. -- No filing fees shall be required of any woman availing herself of the procedures provided by this section. An expedited confidential appeal shall be available to any pregnant woman whom the court denies an order authorizing an abortion. The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition.

(i) Penalty. -- Any person who performs an abortion upon a woman

who is an unemancipated minor or incompetent to whom this section applies either with knowledge that she is a minor or incompetent to whom this section applies, or with reckless disregard or negligence as to whether she is a minor or incompetent to whom this section applies, and who intentionally, knowingly or recklessly fails to conform to any requirement of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be suspended in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974," for a period of at least three months. Failure to comply with the requirements of this section is prima facie evidence of failure to obtain informed consent and of interference with family

relations in appropriate civil actions. The law of this Commonwealth shall not be construed to preclude the award of exemplary damages or damages for emotional distress even if unaccompanied by physical complications in any appropriate civil action relevant to violations of this section. Nothing in this section shall be construed to limit the common law rights of parents.

§3207. Abortion facilities

. . . .

(b) Reports. -- Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, which shall be open to public inspection and copying, containing the following information:

(1) Name and address of the facility.

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership with any other facility.

Any facility failing to comply with the provisions of the subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof.

§3208. Printed information

(a) General Rule. -- The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, the following easily

comprehensible printed materials:

(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall include the following statement:

"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."

(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, non-judgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

. . . .

§3209. Abortion after first trimester

All abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital. Except in cases of good faith judgment that a medical emergency exists, any physician who performs such an abortion in a place other than a hospital is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

§3210. Abortion after viability

(a) Prohibition; penalty. -- Any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree.

It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

(b) Degree of care. -- Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the

unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree.

(c) Second physician. -- Any person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange

for the attendance, to the same room in which the abortion is to be completed, of a second physician. Immediately after the complete explusion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health. Any person who intentionally, knowingly, or recklessly violates the provisions of this subsection commits a felony of the third degree.

§3211. Viability

(a) Determination of viability. -- Prior to performing any abortion upon a woman subsequent to her first trimester of pregnancy, the physician shall determine whether, in his good faith judgment, the child is

viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

(b) Unprofessional conduct. -- Failure of any physician to conform to any requirement of this section constitutes "unprofessional conduct" within the meaning of the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974." Upon a finding by the State Board of Medical Education and Licensure that any physician has failed to conform to any requirement of this section, the board shall not fail to suspend that physician's license for a period of at least three months. Intentional,

knowing or reckless falsification of any report required under this section is a misdemeanor of the third degree.

§3214. Reporting

(a) General rule. -- A report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

(1) Identification of the physician who performed the abortion and the facility where the abortion was performed and of the referring physician, agency or service, if any.

(2) The political subdivision and state in which the woman resides.

(3) The woman's age, race and marital status.

(4) The number of prior pregnancies.

(5) The date of the woman's last menstrual period and the probable gestational age of the unborn child.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Complications, if any, including but not limited to rubella disease, hydatid mole, endocervical polyp and malignancies.

(8) The information required to be reported under section 3211(a) (relating to viability).

(9) The length and weight of the aborted unborn child when measurable.

(10) Basis for any medical judgment that a medical emergency existed as required by any part of this chapter.

(11) The date of the medical consultation required by section 3204(b) (relating to medical consultation and judgment).

(12) The date on which any determination of pregnancy was made.

(13) The information required to be reported under section 3210(b) (relating to abortion after viability).

(14) Whether the abortion was paid for by the patient, by medical assistance, or by medical insurance coverage.

(b) Completion of report. -- The reports shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the department within 15 days after each reporting month.

(c) Pathological examinations. -- When there is an abortion performed during the first trimester of pregnancy, the tissue that is removed shall be subjected to a gross microscopic examination, as needed, by the physician

or a qualified person designated by the physician to determine if a pregnancy existed and was terminated. If the examination indicates no fetal remains, that information shall immediately be made known to the physician and sent to the department within 15 days of the analysis. When there is an abortion performed after the first trimester of pregnancy where the physician has certified the unborn child is not viable, the dead unborn child and all tissue removed at the time of the abortion shall be submitted for tissue analysis to a board eligible or certified pathologist. If the report reveals evidence of viability or live birth, the pathologist shall report such findings to the department within 15 days and a copy of the report shall also be sent to the physician performing the abortion. Intentional, knowing, reckless

or negligent failure of the physician to submit such an unborn child or such tissue remains to such a pathologist for such a purpose, or intentional knowing or reckless failure of the pathologist to report any evidence of live birth or viability to the department in the manner and within the time prescribed is a misdemeanor of the third degree.

(d) Form. -- The department shall prescribe a form on which pathologists may report any evidence of absence of pregnancy, live birth or viability.

(e) Statistical reports; public availability of reports. --

(1) The department shall prepare an annual statistical report for the General Assembly based upon the data gathered under subsection (a). Such report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed,

and shall be available for public inspection and copying.

(2) Reports filed pursuant to subsection (a) shall not be deemed public records within the meaning of that term as defined by the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law, but shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report. On those reports available for public inspection and copying, the department shall substitute for the name of any physician which appears on the report, a unique identifying number. The identity of the physician shall constitute a confidential record of the department. The department may set a reasonable per copy fee to cover the cost of making any copies authorized hereunder.

(3) Original copies of all reports filed under subsection (a) shall be available to the State Board of Medical Education and Licensure and to law enforcement officials, for use in the performance of their official duties.

(4) Any person who willfully discloses any information obtained from reports filed pursuant to subsection (a), other than that disclosure authorized under paragraph (1), (2) or (3) hereof or as otherwise authorized by law, shall commit a misdemeanor of the third degree.

(f) Report by facility. -- Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also

show the total abortions performed in each trimester of pregnancy. These reports shall be available for public inspection and copying.

(g) Report of maternal death. -- After 30 days' public notice, the department shall henceforth require that all reports of maternal deaths occurring within the Commonwealth arising from pregnancy, childbirth or intentional abortion in every case state the cause of death, the duration of the woman's pregnancy when her death occurred and whether or not the woman was under the care of a physician during her pregnancy prior to her death and shall issue such regulations as are necessary to assure that such information is reported, conducting its own investigation if necessary in order to ascertain such data. A woman shall be deemed to have

been under the care of a physician prior to her death for the purpose of this chapter when she had either been examined or treated by a physician, not including any examination or treatment in connection with emergency care for complications of her pregnancy or complications of her abortion, preceding the woman's death at any time which is both 21 or more days after the time she became pregnant and within 60 days prior to her death. Known incidents of maternal mortality of nonresident women arising from induced abortion performed in this Commonwealth shall be included as incidents of maternal mortality arising from induced abortions. Incidents of maternal mortality arising from continued pregnancy or childbirth and occurring after induced abortion has been attempted but not completed, including deaths occurring after induced

abortion has been attempted but not completed as a result of ectopic pregnancy, shall be included as incidents of maternal mortality arising from induced abortion. The department shall annually compile a statistical report for the General Assembly based upon the data gathered under this subsection, and all such statistical reports shall be available for public inspection and copying.

(h) Report of complications. -- Every physician who is called upon to provide medical care or treatment to a woman who is in need of medical care because of a complication or complications resulting, in the good faith judgment of the physician, from having undergone an abortion or attempted abortion shall prepare a report thereof and file the report with the department within 30 days of the

date of his first examination of the woman, which report shall be open to public inspection and copying and shall be on forms prescribed by the department, which forms shall contain the following information, as received, and such other information except the name of the patient as the department may from time to time require:

(1) Age of patient.

(2) Number of pregnancies patient may have had prior to the abortion.

(3) Number and type of abortions patient may have had prior to this abortion.

(4) Name and address of the facility where the abortion was performed.

(5) Gestational age of the unborn child at the time of the abortion, if known.

(6) Type of abortion performed, if known.

(7) Nature of complication or complications.

(8) Medical treatment given.

(9) The nature and extent, if known, of any permanent condition caused by the complication.

(i) Penalties. --

(1) Any person required under this section to file a report, keep any records or supply any information, who willfully fails to file such report, keep such records or supply such information at the time or times required by law or regulation is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

(2) Any person who willfully delivers or discloses to the department any report, record or information known by him to be false commits a misdemeanor of the first degree.

(3) In addition to the above penalities, any person, organization or facility who willfully violates any of the provisions of this section requiring reporting shall upon conviction thereof:

(i) For the first time, have its license suspended for a period of six months.

(ii) For the second time, have its license suspended for a period of one year.

(iii) For the third time, have its license revoked.

§3215. Publicly owned facilities; public officials and public funds.

. . . .

(e) Insurance policies. -- All insurers who make available health care and disability insurance policies in this Commonwealth shall make available such policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest. Any such policy shall contain a premium which is lower than that which is contained in policies offering additional abortion coverage.

. . . .

The severability clause of the Pennsylvania Abortion Control Act provides, as follows:

> The provisions of this act shall be severable. If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of this act, and the application of any provision hereof to any other persons or circumstances, shall not be affected thereby.

Act No. 1982-138, §5, 1982 Pa. Legis. Serv. 750, 794 (Purdon).

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: PROMULGATION OF NEW ORPHANS' COURT RULE 16 GOVERNING PROCEEDINGS PURSUANT TO SECTION 3206 OF THE ABORTION CONTROL ACT AND RENUMBERING OF PRESENT ORPHANS' COURT RULE 16	:NO. 198 E.D. :MISC. DOCKET :1984 : : : : :

O R D E R

AND NOW, this 26th day of November, 1984, new Orphans' Court Rule 16 is promulgated as attached hereto and present Orphans' Court Rule 16 is hereby renumbered as Orphans' Court Rule 17.

To the extent that notice of proposed rule making would be required by Rule 103 of the Pennsylvania Rules of Judicial Administration or otherwise, the immediate adoption of the new Rule and renumbering are hereby found to be required in the interest of justice.

The Rule and renumbering shall be effective immediately.

BY THE COURT:

Chief Justice

Mr. Justice Flaherty and Mr. Justice Papadakos dissent.

Rule 16. Proceedings Pursuant to Section 3206 of the Abortion Control Act

The right of a minor to petition the court for consent under Section 3206(c), 18 Pa.C.S. §3206(c), shall be carried forth pursuant to the following procedures:

16.1. Filing

A petition or motion to the court of common pleas seeking authorization for a physician to perform an abortion shall be filed in the Orphans' Court Division except in Philadelphia, where cases involving minors shall be heard in the Family Court Division. No filing fees shall be required of any pregnant minor woman filing such a petition or motion.

16.2. Contents of Petition

(a) The petition shall be verified by way of a notarized affidavit stating

that the information therein is true and correct to the best of the minor's knowledge, and the petition shall set forth the following facts:

(1) the initials of the minor;

(2) the age of the minor;

(3) the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor;

(4) that the minor has been fully informed of the risks and consequences of the abortion;

(5) that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion;

(6) a prayer for relief asking the court to either grant the minor majority rights for the purpose of personal consent to the abortion, or to give judicial consent to the abortion under 3206(d) based upon a finding that the abortion is in the best interest of the minor; and

(7) the signature of the minor.

(b) where necessary to serve the interest of justice, the Orphans' Court Division, or in Philadelphia the

Family Court Division, shall refer the minor the appropriate personnel for assistance in preparing the petition.

16.3. Representation in Proceedings

The pregnant minor woman may participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem for her.

The court shall advise the pregnant minor woman that she has a right to court-appointed counsel and shall, upon her request, provide her with such counsel.

The court also shall advise her that she has a right to retain private counsel at her own expense.

16.4. Proceedings Confidential

All proceedings conducted in accordance with these rules and pursuant to 18 Pa. C.S. §3206 shall be confiden-

tial. The name of the pregnant woman shall not be entered on any docket which is subject to public inspection. All persons shall be excluded from the hearings except the applicant, her parents or persons standing in loco parentis, and such other persons whose presence is specifically requested by the applicant or her guardian.

16.5. Relevant Evidence

At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion, and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether

the abortion is in the best interest of the minor.

16.6. Confidential Record Keeping

The court shall make in writing specific findings of fact and conclusions of law supporting its decision and shall order a sealed record of the evidence to be maintained. The sealed record shall include the court's findings and conclusions.

All pleadings, briefs, orders, transcripts, exhibits and any other written or recorded material involved in or a part of such proceeding shall be impounded. The identity of the applicant shall not be disclosed in any reported decision under Section 3206.

16.7. Expediency

Proceedings in accordance with these rules and pursuant to 18 Pa. C.S.

§3206 shall be given such precedence over other pending matters as to ensure that the court will reach a decision promptly and without delay but in no case shall the court fail to rule within three business days of the date of filing.

16.8. Right to Appeal

An expedited confidential appeal to the Superior Court shall be available to any pregnant woman whom the court denies an order authorizing an abortion. The notice of intent to appeal shall be given within forty-eight hours of the date of issuance of the order. The record on appeal shall be perfected within five business days from the filing of notice of appeal. The President Judge shall assign all appeals taken pursuant to this Rule to a special submission panel of the court for

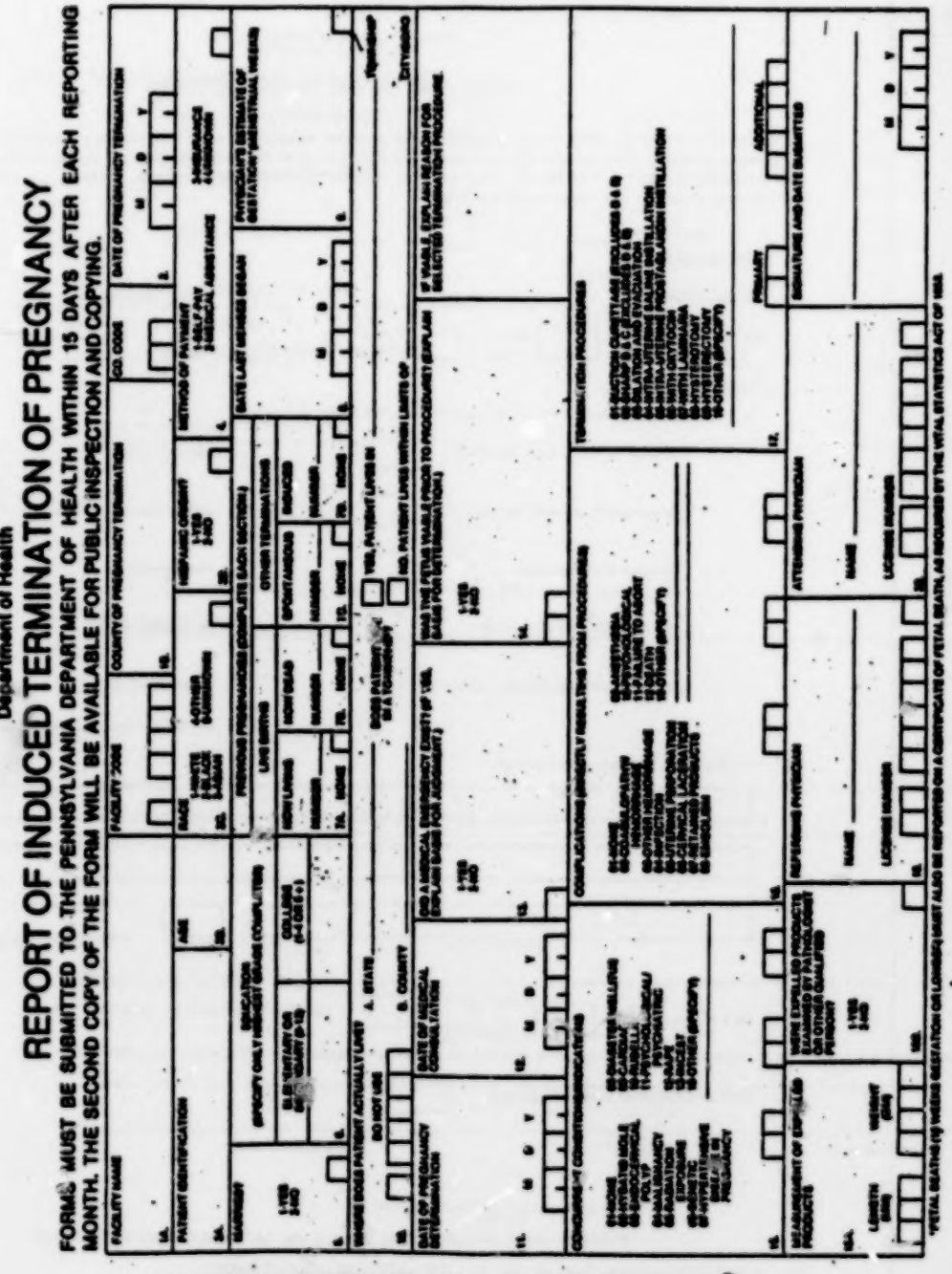
immediate disposition. In no case shall the court fail to rule on the appeal within seven business days of the completion of the record.

File No.

COMMONWEALTH OF PENNSYLVANIA
Department of Health

REPORT OF INDUCED TERMINATION OF PREGNANCY

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH. THE SECOND COPY OF THE FORM WILL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING.



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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

ABORTIONS: REPORT OF COMPLICATIONS

Effective December 8, 1982, every physician who provides medical care or treatment to a woman because of complications resulting from an abortion or attempted abortion must file a report with the Bureau of Quality Assurance, Pennsylvania Department of Health, P.O. Box 90, Harrisburg, Pennsylvania 17108. Reports are due within 30 days of the date physician first examines the woman.

1. Age of patient: ☐

2. Previous pregnancies:

Live Births		Other Terminations	
☐ Now Living	☐ Now Dead	☐ Spontaneous	☐ Induced

a. If previous induced termination(s), type of procedure (check all that apply):

Suction curettage (excludes D&E)	☐	With amniotomy	☐
Sharp curettage (excludes D&E)	☐	With laminaria	☐
Dilation and Evacuation	☐	Hysterotomy	☐
Intra-uterine Saline Instillation	☐	Hysterectomy	☐
Intra-uterine Prostaglandin Instillation	☐	Other (specify)	☐

3. Facility where abortion was performed:

NAME

STREET

POST OFFICE STATE ZIP CODE

4. Date of abortion: ☐☐ MO ☐☐ DAY ☐☐ YR.

5. Estimated menstrual weeks of gestation: ☐

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6. Type of termination procedure (check all that apply):

Suction curettage (excludes D&E)	☐	With amniotomy	☐
Sharp curettage (excludes D&E)	☐	With laminaria	☐
Dilation and Evacuation	☐	Hysterotomy	☐
Intra-uterine Saline Instillation	☐	Hysterectomy	☐
Intra-uterine Prostaglandin Instillation	☐	Other (specify)	☐

7. Nature of complication or complications:

8. Medical treatment given:

9. Nature and extent of any permanent condition caused by the complication:

10. Date of first examination of patient: ☐☐ MO ☐☐ DAY ☐☐ YR.

Physician's Signature | License No. | Date Submitted

[Pa. B. Doc. No. 82-1787. Filed December 3, 1982, 3:03 p.m.]